2006

State of Utah v. Worwood : Brief of Petitioner

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,	
PLAINTIFF/RESPONDENT,	NOT INCARCERATED
v.	
MITCHELL WORWOOD,	Case No. 20060048-SC
DEFENDANT/PETITIONER.	

BRIEF OF PETITIONER
On Writ of Certiorari to the Utah Court of Appeals

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JURISDICTION

Petitioner, MITCHELL WORWOOD ("Worwood"), appeals from the Utah Court of Appeal's decision affirming the trial court's denial of his motion to suppress evidence. *State v. Worwood*, 2005 UT App 539 (**Addendum C**). This Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(a).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

ISSUE 1: This Court granted certiorari as to the following issue:

> Whether delay in the performance of a field sobriety test and transportation of a suspect may be justified by the inability of an officer to immediately effectuate a formal arrest or by the existence of more suitable circumstances for performing the test at another location. *See*, Order.[1]

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[1]Worwood assumes that in granting certiorari on this narrow question, this Court is aware from the Petition that there was no evidence that the delayed performance of a field

STANDARD OF REVIEW: "On certiorari, [this Court] review[s] the court of appeals' decision for correctness, focusing on whether that court correctly reviewed the district court's decision under the appropriate standard of review. An appellate court reviews a district court's decision concerning the constitutionality of a search and seizure for correctness, applying no deference to the district court's legal conclusion." *State v. Rynhart*, 2005 UT 84, ¶9 (citations and quotations omitted). Search and seizure cases present mixed questions of law and fact that are reviewed for correctness based on a totality of the circumstances. *Brigham City v. Stuart*, 2005 UT 13, ¶8, 122 P.3d 506.

STATEMENT OF THE CASE

In September 2003, Worwood was charged with driving under the influence of alcohol with two prior convictions, a third degree felony (R1). A preliminary hearing was conducted on December 12, 2003 (R91), and a hearing on Worwood's subsequent motion to suppress evidence was conducted on February 6, 2004 (R92). The trial court denied Worwood's Motion to Suppress Evidence (R24) in its Ruling dated April 13, 2004 (R60; **Addendum A**). On June 2, 2004, Worwood entered a conditional guilty plea pursuant to *State v. Sery*, 788 P.2d 935 (Utah App. 1988) (R75), and was sentenced on July 20, 2004

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sobriety test was the result of either the officer's inability to effectuate a formal arrest or because conditions at the stop were unsuitable. The officer in this case could have effectuated the arrest, conditions were suitable, but performing a test would have inconvenienced the officer. He testified that he did not perform the test because "I didn't want to" and because he did not want to "mess up" his night (R92:10-14). However, the question of whether a delay might be justified under the narrow circumstances outlined in this Court's Order appears to be one of first impression in Utah.

(R77). Worwood timely filed his Notice of Appeal on August 13, 2004 (R81).

On appeal Worwood argued that the trial court's findings and conclusions that the seizure of Worwood was only a level two encounter were incorrect based on the record evidence set forth below, and that the officer's conduct constituted a *de facto* arrest without probable cause and was thus in violation of both article I, section 14 of the Utah constitution (**Addendum B**), and the Fourth Amendment of the federal constitution (**Addendum B**).

Noting Justice Thorne's dissent, the Utah Court of Appeals rejected Worwood's arguments and affirmed his conviction on December 15, 2005. *State v. Worwood*, 2005 UT App 539 (**Addendum C**). The court stated:

> "We appreciate the concerns expressed by our colleague in his dissent and note that Trooper Wright's mode of investigation would be permissible only in the rarest of circumstances and that this case ultimately turns on the unique set of facts it presents, albeit on a sparse record. . . . Trooper Wright testified that he was returning from horseback riding in a pickup truck with an attached horse trailer, had no means of communication, and was not equipped to make a formal arrest.[2] . . . Although Trooper Wright may have been able to perform a sufficient field sobriety test on Worwood at the point of the initial encounter in Deep Canyon and possibly to transport him to the Juab County Jail, it was not unreasonable for him to drive Worwood to a nearby location in the town to permit an on-duty officer to perform a field sobriety test and, if necessary, effect a formal arrest. . . . Finally, there is no evidence that the change of location significantly extended the encounter, and the record gives no indication that under these unique circumstances Trooper Wright was motivated by any purpose other than quickly and effectively resolving his suspicion that Worwood was intoxicated."[3] *Id.* at ¶9.

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[2]Trooper Wright testified that he could have made an arrest. *See*, fn. 1, *supra*.

[3]The record tells a different story. Citing the record in his dissent, Justice Thorne noted, "[The officer] . . .did not want to 'mess [] up [his] night' by incurring the

STATEMENT OF FACTS

On June 20, 2004, Utah Highway Patrol trooper, Cory Wright ("Wright" or "Trooper Wright"), who was off duty (R92:4), and his friend, Skyler Fautin ("Fautin") (R92:10), were driving an unmarked vehicle out of Deep Canyon in Juab County where they had been riding horses (R92:5). Wright testified that he observed a white truck parked on the road, a wet spot on the road, and a partially crushed beer can near the wet spot (R92:5). Worwood, who had been standing near his truck, entered the truck and moved it to the side of the road to allow Wright to pass (R92:5-6). Wright did not observe any unusual driving pattern by Worwood (R92:6).

Wright testified that his law enforcement job "kicked in" (R92.7), so he stopped, rolled down his passenger window, and without identifying himself as a police officer although Worwood knew he was (R92:15), asked Worwood if he was okay (R92: 6-7). Worwood responded "Yeah" and said that he had stopped to relieve himself (R92:7). Wright testified, "The way [Worwood] was talking, he was talking slow, slurred. He had bloodshot eyes that you could see and so I got out of my vehicle at that point once I talked to him a little bit, I felt like, hey, maybe I'll – I need to get next to this guy. He appears to be intoxicated, have alcohol in his – " (R92:7).

Wright did not smell the odor of alcohol at this time, the only indicia of drinking

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responsibility for Worwood's potential arrest and its accompanying paperwork. Instead, he wanted to hand off the situation to a fellow officer. *State v. Worwood*, 2005 UT App 539, fn. 4.

being bloodshot eyes and slurred speech, which Wright admitted could have been caused by something other than intoxication (R92:13). However, Wright testified that based on these two observations, he refused to allow Worwood to drive his vehicle and Worwood was not free to leave (R92:15). Wright testified that he intended to take Worwood into custody at this point based solely on his slurred speech and bloodshot eyes (R92:13-16)

Wright made Worwood exit his vehicle; he was "not going to let [Worwood] drive until a Trooper looked at him" (R92:13). As Worwood complied, Wright did not smell alcohol nor did he observe any staggering, body sway, or other indicia of intoxication (R92:9-10). Wright could have performed field sobriety tests on Worwood at the stop but refused to do so because "I didn't want to" (R92:10-11, 14). He testified, "it would have messed up my night" because it "would have been my arrest" (R92:10, 16). Therefore, for this reason alone, Wright opted to seize Worwood and transport Worwood to Wright's private residence (R92:10, 14).

Wright seized Worwood's truck, took Worwood into custody and transported him in Wright's truck to Wright's private residence, about a mile and a half away (R92:10). Wright first detected the odor of alcohol after taking Worwood into custody and upon getting into the truck with Worwood (R92: 9). Wright directed Fautin to follow in Worwood's truck (R92:10). Some unknown time later, Utah Highway Patrol trooper Kevin Wright (Cory Wright's brother) responded to Trooper Wright's home, conducted field sobriety tests and transported Worwood to the Juab County Jail (R91:17).

The foregoing record facts are not disputed. Although the trial court erroneously suggested in its findings denying Worwood's motion to suppress evidence that Trooper Wright may have detected the odor of alcohol prior to entering Wright's truck with him, and further speculated that perhaps the canyon road was not a suitable place to conduct field sobriety tests (R60; **Addendum A**), these assertions are contrary to the record set forth in detail above, which record was not disputed below. Trooper Wright testified that he was capable of conducting field sobriety tests at the time of the stop, but that he simply did not want to (R92:10-14). He also testified that he did not detect the odor of alcohol until after he entered his truck and after taking Worwood into custody (R92:9). As Justice Thorne stated in his dissent, "The only competent evidence of the events surrounding Worwood's encounter with Wright was Wright's testimony at the suppression hearing." *State v. Worwood*, 2005 UT App 539, ¶14 (J. Thorne, dissenting).

ARGUMENT

I. THE COURT OF APPEALS' CONCLUSION THAT "IT WAS NOT UNREASONABLE" FOR THE OFFICER TO TRANSPORT WORWOOD TO ANOTHER LOCATION FOR FIELD SOBRIETY TESTS, WHEN THE OFFICER COULD HAVE PERFORMED THE TESTS AT THE LOCATION OF THE STOP, IS INCORRECT.

A. The officer's conduct was a de facto arrest and violated article I, section 14 of the Utah Constitution.

Worwood argued below that the officer's conduct violated both the Fourth Amendment and article I, section 14 of the Utah Constitution. *See*, BRIEF OF APPELLANT ("Br. Appt.") at 5-10. This continues to be Worwood's position.

However, based upon guidance from this Court, article I, section 14 provides greater uniformity of search and seizure law than does the Fourth Amendment, thereby offering both greater privacy protections to Utah citizens and more practical guidance for law enforcement in an area that is growing increasingly complex and inconsistent under Fourth Amendment analysis. Accordingly, Worwood expressly requests this Court to review the issue raised herein under article I, section 14.

Several years ago this Court noted, "choosing to give the Utah Constitution a somewhat different construction [than the Fourth Amendment] may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the Fourth Amendment by the federal courts." *State v. Larocco*, 794 P.2d 460, 465 (1990) (citing numerous other state courts holding that their own constitutions provided greater protection to their citizens than the Fourth Amendment does) (quoting *State v. Watts*, 750 P.2d 1219, n.8 (Utah 1988).[4]

More recently, this Court stated, "article I, section 14 of the Utah Constitution provides a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court." *Brigham City v. Stuart*, 2005 UT 13, ¶11 (further quoting Justice Stewart's concurring opinion in *Larocco* that "this Court should be both

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[4]*See also*, *State v. Anderson*, 910 P.2d 1229 (Utah 1996) (concurring opinion of Stewart, Justice, and concurring and dissenting opinion of Durham, Justice, stating that this Court "should not be bound to construe Utah Constitutional provisions in light of federal law," and that a "contingent relationship between Utah's constitution and the federal . . . [has not been] adopted by this [C]ourt" and "should never be").

the ultimate and final arbiter of the meaning of the provisions of the Utah *Declaration of Rights* and the primary protector of individual liberties"). *Id.* at ¶13. In *Brigham City*, this Court was particularly concerned that the result of a lack of analysis under article I, section 14 might be "a de facto abdication of [this Court's] responsibility as guardians of the individual liberty of our citizens". *Id.* at ¶14;[5] *State v. Rynhart*, 2005 UT 84, ¶12 (Utah 2005) (noting that article I, section 14 provides greater protections to citizens than the Fourth Amendment).

Applied to the facts in this case, as an initial matter this Court has formally taken the position that "warrantless searches and seizures are *per se* unreasonable unless exigent circumstances require action before a warrant can be obtained." *Larocco* at 470 (citation omitted). Exigent circumstances may exist when there is a threat of physical harm or destruction of evidence. *See*, *Brigham City* ¶¶28-44. However, Worwood and his truck were seized in this case not because of exigent circumstances, but because Trooper Wright decided to pass Worwood off to another officer – because he was off-duty and did not want to conduct field sobriety tests (R92:10-14). Hence, Worwood was seized on the basis of "probable inconvenience."

Officer inconvenience, the only reason given in this case for seizing Worwood and transporting him to another location, is not recognized as an exigent circumstance

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[5]*See also*, *State v. Brake*, 103 P.3d 699, 703 (Utah 2004), wherein this Court addressed similar concerns.

justifying a warrantless seizure – under either federal or state law Thus, the warrantless seizure of Worwood was a de facto arrest not supported by probable cause and in violation of both article I, section 14, and the Fourth Amendment [6]

However, in granting certiorari in this case, this Court ordered analysis of whether an officer's inability to immediately effectuate a formal arrest, or more suitable conditions at a different location, might justify a delay (i.e., transporting the defendant) in conducting field sobriety tests.

Initially, it is difficult to imagine a circumstance where an officer would have the ability to transport an individual to another location if the officer truly was unable to effectuate a formal arrest at the scene of the stop In Utah, "an arrest is an actual restraint of the person arrested or submission to custody " Utah Code Ann §77-7-1

The evidence in this case is that Worwood submitted himself to custody, i e., was arrested. A *de facto* arrest also occurs when the events are indistinguishable from an arrest. *See*, *Dunaway v New York*, 442 U S 200, 212 (1979) (explaining that the taking

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[6]*See e g* , *State v Hansen*, 2002 UT 125, ¶36, 63 P 3d 650 ("A level three encounter involves an arrest, which has been characterized as a highly intrusive or lengthy detention that requires probable cause ") (quotations and citations omitted) *State v Deitman*, 739 P.2d 616, 617-18 (Utah 1987) (per curiam) ("an officer may seize a person if the officer has an 'articulable suspicion' that the person has committed or is about to commit a crime; however, the 'detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop'") (citations omitted), *Salt Lake City v Ray*, 2000 UT App 55, P10 (same); *State v Chism*, 2005 UT App 41, ¶12 ("Officers must diligently pursue a means of investigation that is likely to confirm or dispel their suspicions quickly, and it is unlawful to continue the detention after reasonable suspicion is dispelled.") (citations and quotations omitted).

of a murder suspect to the police station for investigative purposes was not merely an investigative detention, but was an arrest).

However, if an officer was faced with an uncooperative suspect who resisted efforts to transport him to another location based solely on reasonable suspicion, the suspect would either escape (if the officer truly was unable to effectuate an arrest) or have to be actually restrained in order to transport him safely. Moreover, he would be subject to lawful arrest for resisting, thereby making the issue of delay moot in the case of a resisting suspect. *State v. Gardiner*, 814 P.2d 568 (Utah 1991) (holding that resisting even an unlawful seizure is itself a crime under the applicable statute).

Thus, the only context in which the question of a delayed investigative detention could apply is one involving a cooperative suspect. But under Utah law, a suspect is arrested when he submits himself to custody; so an officer always has the means of arresting a cooperative person. Utah Code Ann. §77-7-1. Therefore, there is no situation where an officer, acting solely on the basis of reasonable suspicion, cannot effect an arrest. If the suspect resists, the officer has probable cause and the issue is moot; if the suspect submits himself to custody, the officer has the means to arrest. The fact that an officer may lack means of communication or handcuffs should not diminish constitutional protections, including requirements for establishing probable cause prior to arrest.

Further, the real problem with giving law enforcement a license to transport individuals during a purported investigative detention to a "more suitable location," is the

slippery slope inherent in the definition of "more suitable." This case presents a good example of how "more suitable" would be open to subjective interpretation and abuse. Here, an off-duty officer "didn't want to" (R92:11) be bothered with conducting field sobriety tests and the paperwork consequent to an arrest. Hence, "more suitable" was defined by officer whim and convenience.

As this case demonstrates and completely opposed to article I, section 14 as defined by this Court, a license to transport suspects to a "more suitable" location would expand the scope of an investigative detention, invite creative and subjective speculation and interpretation of the term "more suitable," and thereby diminish the rights of citizens.

Thus, the practical result of the court of appeals' decision is that it directly undermines the protections provided by article I, section 12. It diminishes citizens' rights by allowing them to be taken into custody without a warrant or probable cause. The decision thereby creates inconsistency rather than uniformity of the law, and obscures and complicates the parameters of an investigative detention such that the line between an investigative detention and an arrest is effectively eliminated.

Thus, under article I, section 14, Trooper Wright's unnecessary seizure of Worwood exceeded the scope of an investigative detention. Trooper Wright did not want to be bothered with the extra work that would have resulted if field sobriety tests had shown impairment. As he testified, "it would have been my arrest" (R92:10, 16) so "I didn't want to" (R92:11), because "it would have messed up my night".

Further, the evidence obtained in this case was a direct result of the unlawful seizing of Worwood and his truck. It cannot be presumed that the results of the field sobriety tests would have been the same had they been conducted at the scene of the stop. There is no evidence regarding how long the delay was between the stop and when field sobriety tests were finally performed, during which delay Worwood's blood-alcohol level was likely changing. Thus, the results of the field sobriety tests were subject to exclusion under both state and federal law.

Under the Fourth Amendment, "Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was 'come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' *Segura v. United States*, 468 U.S. 796, 804 (1984) (quoting *Wong Sun v United States*, 371 U.S. 471, 484 (1963).

The evidence in this case was obtained as a result of the illegal seizure of Worwood. Therefore, the test results should have been excluded under both the Fourth Amendment and the more protective provisions of article I, section 14. Accordingly, the court of appeals' contrary holding is incorrect.

B. The seizing of Worwood and his truck was similarly a violation of the Fourth Amendment.

Because article I, section 14 offers greater protections than the Fourth Amendment

(*Brigham City v. Stuart*, 2005 UT 13, ¶11), it follows that conduct in violation of the Fourth Amendment is also in violation of the Utah Constitution. Thus, a separate analysis of the issues under the Fourth Amendment is warranted.

Under the Fourth Amendment, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purposes of the stop [and] . . . the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion." *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983) (plurality opinion) (cited by *Illinois v. Caballes*, 543 U.S. 405, 420 (2005); *State v. Menke*, 787 P.2d 537, 543 (Utah App. 1990)); *see also*, *United States v. Tehrani*, 49 F.3d 54, 61 (2d Cir. 1995) ("A permissible investigative stop may become an unlawful arrest if the means of detention are 'more intrusive than necessary'") (citation omitted).

In this case, Trooper Wright's testified that he could have performed field sobriety tests at the stop, but he "didn't want to." (R92:10, 14). In other words, he did not use the least intrusive means available to confirm or dispel his suspicion that Worwood was impaired, and the transporting of Worwood to another location was wholly unnecessary.

The Utah Court of Appeals found Trooper Wright's conduct justified and cited *United States v. Sharpe*[7] in affirming the trial court's denial of Worwood's motion to suppress. *State v. Worwood*, 2005 UT App 539, ¶8. The court of appeals' reliance on

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[7]470 U.S. 675, 686 (1985).

Sharpe is interesting, because *Sharpe* actually supports Worwood's position.

In *Sharpe*, the U.S. Supreme Court reiterated that police are required to pursue "a means of investigation . . . likely to confirm or dispel their suspicions *quickly*, during which time it [is] *necessary* to detain the defendant." *United States v. Sharpe*, 470 U.S. at 686 (emphasis added). Moreover, the Supreme Court "emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Id.* at 685; *see also*, *Fisher v Harden*, 398 F.3d 837 (6th Cir. 2005) ("An investigative [detention] may ripen into a de facto arrest through the passage of time or the use of force. If, through the passage of time or use of force, an investigative detention ripens into an arrest, a suspect's continued detention must be based upon probable cause. . . . The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time) (citing *Terry v. Ohio*, 392 U.S. 1, 19 n. (1968)).

The Utah Court of Appeals ignored all of these factors. It sanctioned a means of investigation that was not only unnecessary and intrusive, but unlikely to confirm or dispel Trooper Wright's suspicions quickly. Indeed, the court did not just ignore the officer's expressed purpose of promoting his own convenience in transporting Worwood to another location (R92:10-14), but erroneously concluded, "the record gives no indication that under these unique circumstances Trooper Wright was motivated by any purpose other than quickly and effectively resolving his suspicion that Worwood was

intoxicated." *State v. Worwood*, 2005 UT 539, ¶9.

This incorrect factual conclusion is puzzling in light of what was argued below and mirrored by Justice Thorne's observation from the record that "[The officer] . . .did not want to 'mess [] up [his] night' by incurring the responsibility for Worwood's potential arrest and its accompanying paperwork. Instead, he wanted to hand off the situation to a fellow officer." *State v. Worwood*, 2005 UT App 539, fn. 4.

According to Trooper Wright's own testimony, the least intrusive means available to him for quickly confirming or dispelling his suspicion that Worwood was impaired was a short field sobriety test that should have been conducted at the scene of the stop. The unnecessary seizing of Worwood and his truck without probable cause and to facilitate officer convenience exceeded the scope of an investigative detention and thereby violated the Fourth Amendment. The court of appeals' contrary holding is incorrect.

CONCLUSION

The Utah Court of Appeals created a new personal convenience exception to both article I, section 14, and the Fourth Amendment. In light of contradictory precedent from this and other courts cited herein, the Utah Court of Appeals' holding in this case is unhelpful to either police or prosecutors, and thus an unworkable anomaly in search and seizure jurisprudence. It is inconsistent and has only generated additional confusion in an area of the law that is growing increasingly complex.

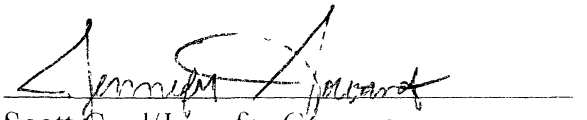
Particularly under article I, section 14, this new exception not only expands the

parameters of permissible police conduct in the context of an investigative detention, but it blurs the line between an investigative detention and an arrest. Moreover, it diminishes citizens' privacy and protections against unlawful search and seizure. Therefore, it abdicates those protections and adds complexity and inconsistency to an already complicated and inconsistent area of jurisprudence

Accordingly, Petitioner, Mitchell Worwood, respectfully requests this Court to reverse the Utah Court of Appeals and to vacate his conviction.

Respectfully submitted this 21st day of April, 2006.

FILLMORE SPENCER, LLC



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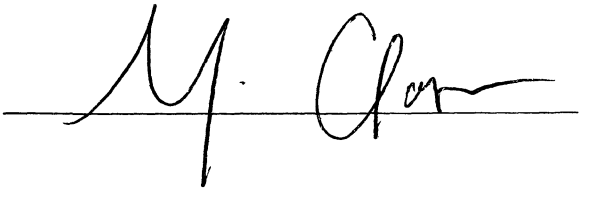
Certificate of Mailing

I hereby certify that I mailed two true and correct copies of the foregoing to Assistant Attorney General Fred Voros Jr., 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 21st day of April, 2006.



ADDENDA

ADDENDUM A

RULING DENYING MOTION TO SUPPRESS EVIDENCE

IN THE FOURTH JUDICIAL DISTRICT COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. MITCHELL L. WORWOOD Defendant.	**RULING** Case No. 031600152 Judge Donald J. Eyre

This matter comes before the Court on Defendant's Motion to Suppress. The Court has reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, issues the following:

FACTUAL SUMMARY

1. On or about June 20, 2003, Korey Wright, an off duty highway patrolman, was in the area of Deep Canyon when he observed a pickup truck stopped in the middle of the road. Near the truck, Trooper Wright saw a man, a wet spot in the road, and a beer can. Trooper Wright observed the man get in the truck and pull it over to the side of the road so that Trooper Wright could pass. Trooper Wright later observed a cooler that appeared to have been recently emptied.

2. Trooper Wright stopped to talk to the man, who was later identified as Mitchell Worwood. While talking to Mr. Worwood, Trooper Wright noticed Mr. Worwood had blood shot eyes and slurred speech. After talking with Mr. Worwood at a closer proximity, Trooper Wright also smelled the odor of alcohol. Based on these observations, Trooper Wright believed that Mr. Worwood was intoxicated and was unable to safely operate his vehicle. Due to this

belief, Trooper Wright indicated to Mr. Worwood that he was not going to allow Mr. Worwood to drive until he had been checked out by an officer. Trooper Wright testified that Mr. Worwood was not free to leave at this point.

3. Trooper Wright did not have a telephone or other means to communicate with law enforcement. Due to this fact, Trooper Wright asked Mr. Worwood to ride with him in the trooper's truck and have another individual drive Mr. Worwood's truck to Trooper Wright's house, which was nearby, in order to meet a law enforcement officer. Mr. Worwood then got into Trooper Wright's truck, Trooper Wright's passenger got into Mr. Worwood's truck, and they all drove a short distance to Trooper Wright's house.

4. Another highway patrol trooper, Kevin Wright, responded to Korey Wright's house and took over this investigation. Trooper Kevin Wright administered field sobriety tests to the Defendant. The Defendant failed these tests, and Trooper Kevin Wright arrested Mr. Worwood.

RULING

The "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is guaranteed under the Fourth Amendment of the United States Constitution and under Article I, Section 14 of the Utah Constitution.

Generally, there are three levels of constitutionally permissible encounters between police officers and the public:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an 'articulable suspicion' that the person has committed or is about to commit a crime; however, the 'detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop', (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Smith, 781 P.2d 879, 881 (Utah Ct. App. 1989)(quoting *State v. Deitman*, 739 P.2d 616,

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617-18 (Utah 1987)).

The Utah Court of Appeals has held that a person is not seized when a police officer merely approaches the person on the street and asks questions if the person stopped is willing to listen. *State v. Trujillo*, 739 P.2d 85, 87-88 (Utah Ct. App 1987). In this case, Trooper Wright approached Mr. Worwood and asked what he was doing. At this point, Mr. Worwood was willing to listen and answer the trooper's questions. The defendant was free to leave, and Trooper Wright had not shown any authority over the defendant. Therefore, this Court finds that the trooper's initial interaction with the defendant was a level one interaction.

A person is "seized" within the meaning of the Fourth Amendment when an officer deprives a person of his liberty by means of physical force or show of authority. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Trujillo*, 739 P.2d 85, 87 (Utah Ct. App 1987). Under the Fourth Amendment's protection against unreasonable searches and seizures, there must be a reasonable basis for even a brief investigatory detention and officers must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Whether the objective facts known to the officer support a reasonable suspicion of wrongdoing is to be determined by the totality of the circumstances and in light of the officer's experience and training. *State v. Dorsey*, 731 P.2d 1085 (Utah 1986).

In this case, while the trooper was speaking with the defendant, the trooper noticed that the defendant had blood shot eyes, that his speech was slurred, and that the defendant had an odor of alcohol on his breath. The trooper also observed the defendant's truck, an empty beer can, a wet spot, and an emptied cooler in the middle of the mountain road. Mr. Worwood also indicated to the trooper that he had stopped to urinate. These observations in totality caused the trooper to believe that Mr. Worwood was under the influence of alcohol to the extent that he was unable to safely operate his vehicle.

The Court finds that under the totality of the circumstances, the officer had reasonable suspicion that the defendant was committing a crime and lawfully detained the defendant to investigate. See, *State v. Davis,* 821 P.2d 9, 12 (Utah Ct. App. 1991). The encounter escalated to a level two encounter when Trooper Wright told the defendant that he could not drive his vehicle until he had been checked out by another officer. The trooper also testified that the defendant was not free to leave at this point.

The defendant argues that his detention became illegal when the trooper required him to ride to another location and wait for another trooper to conduct field sobriety tests. The Utah Supreme Court has held that an investigatory detention must be "temporary and last no longer than is necessary to effect the purpose of the stop." *State v. Deitman*, 739 P.2d 616, 617 (Utah 1987).

In this case, the Court finds that it was reasonable for the trooper to transport the defendant a short distance from the mountain rode where the stop occurred to the trooper's home. The Court finds that transporting the defendant to another location was reasonable under the circumstances and that it was more fair to the defendant to conduct the field sobriety test in a location that would allow the officer to obtain accurate test results. Additionally, the Court finds under the circumstances that it was reasonable for Trooper Korey Wright to hand off the investigation of DUI to another trooper in that the DUI statutes allow the trooper to hand off a DUI investigation and the trooper's actions did not cause an unreasonable delay in the investigation. Therefore, the Court finds that the defendant was not unlawfully detained.

CONCLUSION

For the above reasons, the Court hereby rules that Defendant's Motion to Suppress is denied.

DATED this 13th day of April, 2004.

DONALD J. EYRE, JUDGE

ADDENDUM B

UTAH CONSTITUTION, ARTICLE I, §14

UNITED STATES CONSTITUTION, AMENDMENT IV

Utah Constitution, Article I, §14

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ADDENDUM C

STATE V. WORWOOD, 2005 UT APP 539, 127 P.3D 1265

LEXSEE 2005 UT APP 539

State of Utah, Plaintiff and Appellee, v. Mitchell Worwood, Defendant and Appellant.

Case No. 20040701-CA

COURT OF APPEALS OF UTAH

2005 UT App 539; 127 P.3d 1265; 541 Utah Adv. Rep. 25; 2005 Utah App. LEXIS 553

December 15, 2005, Filed

PRIOR HISTORY: [***1] Fourth District, Nephi Department. 031600152. The Honorable Steven L. Hansen.

COUNSEL: Scott P. Card and Jennifer Gowans, Provo, for Appellant.

Mark L. Shurtleff and J. Frederic Voros Jr., Salt Lake City, for Appellee.

JUDGES: James Z. Davis, Judge. Carolyn B. McHugh, Judge, THORNE, Judge (dissenting).

OPINIONBY: James Z. Davis

OPINION: [**1266] DAVIS, Judge:

[*P1] Mitchell Worwood appeals the district court's ruling denying his motion to suppress evidence taken during sobriety tests. We affirm.

BACKGROUND

[*P2] On June 20, 2003, Korey Wright, an off-duty Utah Highway Patrol trooper, and his friend, Skyler Fautin, were driving Wright's pickup truck and horse trailer on a dirt road out of Deep Canyon in Juab County when they encountered a white pickup truck parked in the middle of the road. At the time, Worwood, the driver of the truck, had exited the vehicle, but soon reentered and drove it to the side of the road to allow Trooper Wright and his truck to pass. Trooper Wright noticed a large wet spot in the road, a beer can, and later an ice cooler that apparently had been recently emptied.

[*P3] Trooper [***2] Wright pulled his vehicle alongside Worwood's to speak to him. During the conversation, Trooper Wright noted [**1267] that Worwood, who was sitting in the driver's seat, had bloodshot eyes and slurred speech. Trooper Wright exited his vehicle to continue the conversation and testified that he smelled alcohol on Worwood's breath. n1 All of these signs led Trooper Wright to believe that Worwood was likely intoxicated and could not safely operate a vehicle. Trooper Wright told Worwood that he would not allow him to drive until he had been checked out by a police officer. Worwood appeared to recognize that Trooper Wright was a law enforcement officer and complied with the request. Because Trooper Wright did not have a telephone or other means of communication, he instructed Fautin to drive Worwood's vehicle to a nearby dairy and call for an officer to respond at Trooper Wright's house. Trooper Wright then asked Worwood to accompany him there, to which Worwood agreed, and Trooper Wright drove him approximately a mile and a half to his house. There, they met an on-duty trooper who performed a field sobriety test, determined there was probable cause to arrest, and transported Worwood to the Juab County [***3] Jail where further tests revealed a breath alcohol concentration of .248. n2

n1 Worwood claims on appeal that Trooper Wright smelled alcohol on Worwood's breath only after Worwood was seated in Trooper Wright's pickup truck, but fails to challenge the trial court's finding that Trooper Wright smelled the odor of alcohol on Worwood's breath "after talking with Mr. Worwood at a closer proximity" but before asking him to ride with him in the truck. See *State v. Arguelles, 2003 UT 1, P67, 63 P.3d 731* (noting that a trial court's finding of fact is conclusive unless appellant proves the trial court committed clear error and marshals all the record evidence in support of and against the finding).

n2 The arresting officer testified that Worwood had a blood alcohol content of ".248

liters," which presumably means a level of .248 grams per 210 liters of breath. See Utah Code Ann. § 41-6-44(2)(c) (Supp. 2002) (renumbered as *Utah Code Ann. § 41-6a-502 (2005)*).

[*P4] [***4] Before trial, Worwood moved to suppress the evidence obtained from the sobriety test, claiming it was obtained by means of an illegal seizure. The trial court held an evidentiary hearing and found that Trooper Wright had noticed signs of intoxication early in the encounter, including bloodshot eyes, slurred speech, and "after talking with Mr. Worwood at a closer proximity, Trooper Wright also smelled the odor of alcohol." The trial court also found that testing Worwood at another location was necessary because "it was more fair to the defendant to conduct the field sobriety test in a location that would allow the officer to obtain accurate test results." The trial court denied the motion, concluding that under these circumstances Trooper Wright had a reasonable suspicion to execute a level-two investigatory detention and that driving Worwood to Trooper Wright's house was a reasonable extension of that detention. We agree and affirm.

ISSUES AND STANDARD OF REVIEW

[*P5] On appeal, Worwood claims that the trial court erred in denying his motion to suppress because (1) Trooper Wright did not have a reasonable suspicion sufficient to effect an investigatory detention and (2) when [***5] Trooper Wright drove him to Trooper Wright's house to perform the field sobriety test, the encounter became a de facto arrest for which there was no probable cause. We review the trial court's legal basis for denying Worwood's motion for correctness without deference to the trial court's application of the law to the facts. See *State v. Brake, 2004 UT 95, P15, 103 P.3d 699*.

ANALYSIS

[*P6] Worwood first contends that Trooper Wright did not have sufficient grounds to execute an investigatory detention. "It is settled law that 'a police officer may detain and question an individual when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.'" *State v. Markland, 2005 UT 26, P10, 112 P.3d 507* (quoting *State v. Chapman, 921 P.2d 446, 450 (Utah 1996)*). Although the officer's suspicion must be based on "'specific and articulable facts and rational inferences,'" it need not be supported by probable cause or even a preponderance of the evidence. Id. (quoting *United States v. Werking, 915 F.2d 1404, 1407* [**1268] *(10th Cir. 1990))*. In reviewing an officer's [***6] conduct under the *Fourth Amendment*, we consider the facts in their totality and "'judge the officer's conduct in light of common sense and ordinary human experience and . . . accord deference to an officer's ability to distinguish between innocent and suspicious actions.'" *Id at P11* (alteration in original) (quoting *United States v Williams, 271 F.3d 1262, 1268 (10th Cir 2001))*.

[*P7] Here, Trooper Wright effected a level-two investigative detention after seeing an empty beer can, a large wet spot, and later an empty cooler. He also noticed signs that Worwood was intoxicated, including bloodshot eyes, slurred speech, and the odor of alcohol on his breath. These indicators, combined with the fact that Worwood apparently intended to continue driving, justify the reasonable and common sense inference that Worwood had been or was about to drive a motor vehicle while intoxicated.

[*P8] Second, Worwood contends that when Trooper Wright drove him to another location to perform a field sobriety test he exceeded the scope of the investigative detention and effected a de facto arrest After commencing an investigative detention, officers must """dilligently [***7] [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly, during which time it [is] necessary to detain the defendant."""" *State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994)* (alterations in original) (citations omitted). Defendant correctly observes that an investigative detention may become a de facto arrest requiring probable cause when police transport a suspect to a new location. See, e.g., *Dunaway v. New York, 442 U.S. 200, 216, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979)*. However, while courts acknowledge that the precise point at which an investigative detention becomes a de facto arrest is not clear, an important factor in determining when an arrest has occurred is whether the degree of intrusion is not "reasonably related to the facts and circumstances at hand." *State v Leonard, 825 P 2d 664, 669-70 (Utah Ct. App. 1991)*. We recognize the "'important need to allow authorities to graduate their responses to the demands of any particular situation,'" and the fact that we could conceive of less intrusive means to resolve a suspicion does not alone render an officer's efforts to resolve the suspicion [***8] unreasonable. *United States v Sharpe 470 U S 675 686-87, 105 S. Ct. 1568, 84 L Ed 2d 605 (1985)* (citation omitted). Rather, we consider only whether the officer's failure to pursue such other means was unreasonable. See id.

[*P9] We appreciate the concerns expressed by our colleague in his dissent and note that Trooper Wright's mode of investigation would be permissible only in the rarest of circumstances and that this case ultimately turns on the unique set of facts it presents, albeit on a sparse record. Upon review of the known facts, we cannot conclude that an off-duty law enforcement officer

exceeds the permissible scope of an investigatory detention when he transports a driver he suspects to be intoxicated a short distance from an uninhabited area to meet an on-duty officer for further investigation. Trooper Wright testified that he was returning from horseback riding in a pickup truck with an attached horse trailer, had no means of communication, and was not equipped to make a formal arrest. Trooper Wright indicated to Worwood that the detention was temporary and for investigatory purposes by explaining that he could not allow him to drive "until he had been [***9] checked out by an officer." Although Trooper Wright may have been able to perform a sufficient field sobriety test on Worwood at the point of the initial encounter in Deep Canyon and possibly to transport him to the Juab County Jail, it was not unreasonable for him to drive Worwood to a nearby location in the town to permit an on-duty officer to perform a field sobriety test and, if necessary, effect a formal arrest. Further, the trial court found that conducting the sobriety test in town would "allow the officer to obtain accurate test results." Worwood has not challenged this finding and has not alleged that the results of the sobriety test would have been substantially different if conducted minutes earlier. Finally, there is no evidence that the change of location significantly extended the encounter, and the record gives no indication that under these unique circumstances Trooper Wright was motivated by any purpose other than quickly [**1269] and effectively resolving his suspicion that Worwood was intoxicated.

[*P10] Accordingly, we affirm.

James Z. Davis, Judge

[*P11] I CONCUR:

Carolyn B. McHugh, Judge

DISSENTBY: William A. Thorne Jr.

DISSENT: THORNE, Judge (dissenting): [***10]

[*P12] I respectfully dissent from the majority's conclusion that this case presents merely a level two stop of reasonable scope and duration.

[*P13] First and foremost, I believe that Trooper Wright made a de facto arrest of Worwood when he took physical custody of Worwood and transported him from the canyon where the initial encounter occurred to Wright's private residence. As a level three encounter, this arrest was illegal because it was not supported by probable cause. See *State v. Hansen, 2002 UT 125, P36, 63 P.3d 650* ("A level three encounter involves an arrest, which has been characterized as a highly intrusive or lengthy detention that requires probable cause." (alterations omitted) (quotations and citations omitted)). However, even if Wright's actions created only a level two encounter, Worwood's detention was unreasonable in both its scope and its duration. See *Salt Lake City v. Ray, 2000 UT App 55, P10, 998 P.2d 274* ("[A level two] 'detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop[.]'" (citation omitted)). Wright's actions violated the *Fourth Amendment* under either analysis, [***11] and I would suppress all evidence obtained as a result of those actions.

[*P14] The only competent evidence of the events surrounding Worwood's encounter with Wright was Wright's testimony at the suppression hearing n1 Wright testified that he took Worwood into custody after observing his bloodshot eyes and slurred speech. Rather than perform field sobriety tests on Worwood at the scene, however, Wright transported him in Wright's private vehicle out of the canyon, onto the state highway, and to Wright's private residence n2 in Levan, Utah, a distance of "about a mile and a half." Wright testified that he believed that Worwood knew he was a law enforcement officer. Wright entrusted Worwood's vehicle to Wright's passenger, and the passenger drove the vehicle to a local dairy to call for assistance, and then to Wright's residence.

n1 The trooper who formally arrested Worwood testified at the preliminary hearing, but he offered only hearsay testimony about the circumstances of Worwood's initial detention and transport.

n2 The fact that Wright chose to transport Worwood to his private residence gives me additional concern. While it does not appear to have been a factor in this case, the transport of a lone detainee to a private residence, in an unmarked car by an off-duty officer, could present significant cause for alarm to the detainee, particularly if it occurred at night. If the officer was an imposter, discomfort could escalate into grave danger. I do not believe that this is the sort of scenario that we wish to encourage by excusing Wright's actions in this case.

[***12]

[*P15] These actions represent a significant seizure of Worwood and his vehicle, and any reasonable person in Worwood's position would have interpreted these actions as an arrest. Accordingly, I would hold that Wright effected a level three arrest as soon as Worwood became aware that he was in police custody, that his

vehicle had been seized, and that he was going to be transported a significant distance for the purpose of being handed off to another officer. See *State v. Leonard, 825 P.2d 664, 674 (Utah Ct. App. 1991)* (Orme, J., dissenting) ("The accepted rule is that what might have otherwise been a level-two stop evolves into a level-three de facto arrest when, in view of all the circumstances, a reasonable, innocent person in the suspect's place would believe himself to be under arrest."); see also *Florida v. Royer, 460 U.S. 491, 502, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)* (characterizing the relevant inquiry as whether the suspect believed he was being detained). I would also hold that Wright's observations of Worwood provided only a reasonable suspicion that Worwood was driving while intoxicated, but not the level of probable cause required to make an [***13] arrest. n3

n3 Wright testified that the only evidence of Worwood's intoxication at the time of his initial detention was his bloodshot eyes and slurred speech. He testified that he only smelled alcohol on Worwood once he and Worwood were inside Wright's vehicle. Accordingly, Worwood's arrest preceded Wright's observation of the smell of alcohol, and that evidence cannot be used to bolster the legality of Worwood's initial arrest. Even taking the smell of alcohol into account, however, I believe that Wright could only objectively be said to have had a reasonable suspicion of Worwood's intoxication.

[**1270] [*P16] Wright's reasonable suspicion clearly justified some detention of Worwood for further investigation. However, Wright exceeded the permissible scope and duration of that detention when he transported Worwood to his home for performance of field sobriety tests that could just as easily have been conducted at the initial scene. "Officers must diligently pursue a means of investigation that is likely to confirm [***14] or dispel their suspicions quickly[.]" *State v. Chism, 2005 UT App 41, P12, 107 P.3d 706* (quotations and citation omitted). Wright testified that he could have performed field sobriety tests at the scene of the initial encounter, but chose not to for the sole reason of personal convenience. n4 The resulting increase in both the scope and the duration of Worwood's detention were therefore unnecessary and exceeded the legal boundaries of an otherwise legitimate level two stop. See *id. at P15* ("Investigative acts that are not reasonably related to dispelling or resolving the articulated grounds for the stop are permissible only if they do not add to the delay already lawfully experienced and do not represent any further intrusion on [the detainee's] rights." (alteration in original) (quotations and citation omitted)).

n4 Wright, being off duty, did not want to "mess[] up [his] night" by incurring the responsibility for Worwood's potential arrest and its accompanying paperwork. Instead, he wanted to hand off the situation to a fellow officer. While I find this motivation understandable, Wright, having chosen to exercise the power of the State to investigate Worwood despite his off-duty status, owed Worwood the full complement of constitutional rights. I do not believe that those rights permit the scope or duration of a level two stop to be extended on the basis of an officer's desire to avoid the responsibility of otherwise necessary paperwork.

[***15]

[*P17] The majority suggests that Worwood's transport was also justified by Wright's motive to obtain more accurate results from field sobriety tests. I find this unavailing, as field sobriety tests are routinely performed roadside in less than ideal conditions. Further, such a justification would permit the routine "relocation" of drunken driving suspects to a jail or police station where environmental factors such as light, sound, and footing could be controlled.

[*P18] For these reasons, n5 I would hold that Wright's actions constitute both a level three stop unsupported by probable cause, and an impermissible departure from the allowable scope and duration of a legitimate level two stop. Under either analysis, the challenged evidence must be suppressed and Worwood's conviction reversed. Accordingly, I dissent from the majority opinion.

n5 I believe reversal is warranted solely on the basis of violations of Worwood's *Fourth Amendment* rights. However, I cannot help looking beyond the immediate case and seeing in the majority opinion a green light for the routine transport of drunken driving suspects on the flimsiest of excuses. In my opinion, today's result opens the door for all manners of avoidance of the requirements of the *Fourth Amendment*. For example, the resulting ability to make an inventory search of a suspect's vehicle will provide a strong incentive for law enforcement to "smell alcohol" and transport the suspect and his vehicle, allowing them to make an otherwise impermissible search of the vehicle for contraband.

[***16]

William A. Thorne Jr., Judge